No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1994

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether constitutional separation-of-powers principles are violated by the ex officio, non-voting membership on the Federal Election Commission of the Secretary of the Senate and the Clerk of the House of Representatives.

2. Whether, if Question 1 is answered in the affirmative, the Commission's prior actions (including the civil penalty imposed in this case) should nevertheless be given de facto validity.

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INTEREST OF THE UNITED STATES

Both issues presented by this case are of considerable importance to the United States. The United States has a substantial interest in questions involving the application of constitutional separation-of-powers principles, and particularly in questions regarding the power of Congress to place its agents as members of entities within the Executive Branch. The United States also has a substantial interest in continued recognition of the principle that, under appropriate circumstances, the prior acts of a governmental actor may be accorded de facto validity even if it has been determined that the actor's appointment was legally flawed. At the Court's invitation, the United States filed a brief amicus curiae

at the petition stage of this case, addressed solely to the question whether the Federal Election Commission has statutory authority to represent itself in this case in this Court.[1]

STATEMENT

1. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, substantially altered the legal regime governing presidential and congressional election campaigns. The 1974 statute amended the Federal Election Campaign Act of 1971 (FECA or Act) to provide, *inter alia*, that civil enforcement of federal election laws would be entrusted to the newly established Federal Election Commission (FEC or Commission). The statute provided that the Commission would be composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six additional members. Two of these members would be appointed by the President pro tempore of the Senate, two by the Speaker

[1] Although the United States disagrees with the Federal Election Commission regarding the proper disposition of the separation-of-powers issue posed by this case, the Solicitor General has authorized the Commission to file a petition for a writ of certiorari and to represent itself in this Court. On prior occasions the Solicitor General has deemed it appropriate to authorize federal agencies to file briefs in this Court on their own behalf asserting positions contrary to those of the United States. See, *e.g.*, *Dirks* v. *SEC*, 463 U.S. 646, 648 n.* (1983) (Securities and Exchange Commission authorized by Solicitor General to file brief defending the judgment of the court of appeals, although Solicitor General filed a brief urging reversal); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 367 n.* (1973) (Federal Power Commission authorized by Solicitor General to file brief amicus curiae supporting position contrary to that asserted by the United States).

of the House of Representatives, and two by the President. All would be subject to confirmation by a majority vote in both Houses. See 2 U.S.C. 437c(a)(1) (Supp. V 1975); see Pub. L. No. 93-443, § 208(a), 88 Stat. 1280-1281.

In *Buckley* v. *Valeo*, 424 U.S. 1, 109-141 (1976) (per curiam), the Court held that this scheme violated the Appointments Clause, Art. II, § 2, Cl. 2. The Court held in particular that "[t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief," 424 U.S. at 138, could be exercised only by "Officers of the United States," selected in conformity with the Appointments Clause, *id.* at 124-141. The Court suggested as well that the method by which the voting commissioners were appointed violated more general separation-of-powers principles. *Id.* at 118-124. Significantly, however, the Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date * * *. The past acts of the Commission are therefore accorded *de facto* validity." *Id.* at 142.

In response to this Court's decision in *Buckley*, Congress again amended the FECA. The statute, *inter alia*, reestablished the FEC:

> There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under

this paragraph may be affiliated with the same political party.

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a), 90 Stat. 475, codified as amended at 2 U.S.C. 437c(a)(1).

The Commission possesses wide-ranging authority to administer the federal election laws.[2] The present case involves the FEC's exercise of its power to seek civil penalties. The Act provides that, "[i]f the Commission * * * determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of [the FECA] or chapter 95 or chapter 96 of title 26," the Commission "shall make an investigation of such alleged violation," 2 U.S.C. 437g(a)(2), and may attempt to resolve the matter through a voluntary conciliation agreement, 2 U.S.C. 437g(a)(4)(A). If efforts to achieve a voluntary agreement fail, "the Commission may, upon an affirmative vote of 4 of its members, institute a civil

[2] As was true prior to *Buckley* v. *Valeo*, the Commission's broad-ranging powers fall generally into three categories. See 424 U.S. at 109-113, 137-143. First, the Commission exercises powers of an investigative or informative nature, including recordkeeping, investigative, and disclosure functions. See, *e.g.*, 2 U.S.C. 437d(a)(1)-(5) and (9), 438(a) and (b). In addition, the Commission performs a variety of administrative functions, including rulemaking (see 2 U.S.C. 437d(a)(8), 438(a)(8)), the rendering of advisory opinions (see 2 U.S.C. 437d(a)(7), 437f), and formulation of general policy (see 2 U.S.C. 437c(b)(1)). Finally, the Commission is entrusted with "exclusive jurisdiction with respect to the civil enforcement of [the Act and Chapter 95 and Chapter 96 of Title 26]." 2 U.S.C. 437c(b)(1); see *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 485, 489 (1985); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982).

action for relief" in federal district court. 2 U.S.C. 437g(a)(6)(A).

2. This case began as an enforcement action brought by the FEC against various entities and an officer of the National Rifle Association (NRA). The NRA's Institute for Legislative Action (ILA) conducted mailings in 1988 to raise funds for the Political Victory Fund (PVF), a separate segregated fund of the NRA that provides financial support to candidates for election. See Pet. 5-6. The PVF reimbursed the ILA for the cost of those mailings, but the ILA subsequently transferred an identical amount to the PVF. See Pet. App. 2a-3a. The FEC concluded that this transaction violated 2 U.S.C. 441b(a), which prohibits corporate contributions and expenditures in connection with federal elections. See 11 C.F.R. 114.5(b).

After unsuccessful negotiations with the NRA, the FEC brought this civil enforcement action against NRA entities and one of its officials. Respondents asserted three constitutional challenges to the statute establishing the Commission. First, respondents argued that the Act impermissibly restricts the President's nomination power by requiring that no more than three of the six voting members of the Commission can be affiliated with the same political party. Second, they asserted that, in the absence of any statutory provision authorizing removal of commissioners by the President, the Commission's civil enforcement powers encroach on the President's authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Third, they contended that by making the Secretary of the Senate and the Clerk of the House of Representatives ex officio members of the Commission, Congress had exceeded its authority under Article I. See Pet. App. 3a-6a.

The district court rejected these arguments on standing grounds. It concluded that "it is the President and not the [respondents] who can challenge alleged infringements of presidential powers because only the President's interests are affected." Pet. App. 24a. It stated that "ultimately, [respondents] have raised an issue that bears on the rights of a third party, namely the President, and not on their own legal interests," *id.* at 26a; it noted as well that respondents had "not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question," *ibid.* The district court granted summary judgment in favor of the Commission on the merits of the enforcement action and awarded declaratory and injunctive relief and assessed a financial penalty of $40,000. *Id.* at 27a-28a, 29a-30a, 31a-34a, 35a.

3. The court of appeals reversed. Pet. App. 1a-18a. It held that respondents had standing to raise two of their constitutional claims, *id.* at 6a-11a,[3] and that the ex officio membership of congressional officers—the Secretary and Clerk—violated separation-of-powers principles, *id.* at 13a-16a. The court concluded that the only conceivable purpose of this membership was to influence the Commission, and that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." *Id.* at 15a (citing *Metropolitan Washington Airports Auth.* v. *Citizens*

[3] The Court concluded, however, that respondents' challenge to the statutory restrictions on party affiliation was not justiciable. Pet. App. 8a-11a. It rejected respondents' contention that the Commission's independence unconstitutionally limited the President's authority to execute the laws, concluding that the statute could properly be construed to afford the President constitutionally sufficient power to remove commissioners from their positions. See *id.* at 11a-12a.

for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991)). It rejected the FEC's argument that "Congress intended *ex officio* membership to fulfill [a] coordinating function by having the Secretary and the Clerk play a mere 'informational or advisory role' in agency decisionmaking," Pet. App. 15a, explaining:

> Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. In that capacity, Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission. What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents 'beyond the legislative sphere' by naming them to membership on an entity with executive powers.

Id. at 15a-16a (citation and footnote omitted). The court held that the de facto officer doctrine could not be used to redeem the Commission's actions in this enforcement proceeding. It explained that respondents "raise the constitutional challenge as a defense to an enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the [respondents] in this case." *Id.* at 17a-18a.[4]

[4] On October 26, 1993, four days after the court of appeals' decision, the Commission "reconstituted itself as a body of six voting members subject to further judicial action." 58 Fed. Reg. 59,640 (1993). Shortly thereafter, the reconstituted Commission issued orders ratifying the FEC's existing forms and regulations, *id.* at 59,640-59,641, and announcing that its past advisory opinions

SUMMARY OF ARGUMENT

1. The membership on the Federal Election Commission of the Secretary of the Senate and the Clerk of the House of Representatives violates constitutional separation-of-powers principles. As Commission members, these congressional officers are entitled to all the prerogatives of membership not specifically proscribed. The legislative history evidences Congress's expectation that these officials would play a substantial role in the Commission's exercise of its duties. Such placement of congressional agents on an Executive Branch entity threatens "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

These constitutional principles are not rendered inapplicable because the Secretary and Clerk do not have the right to vote. This Court's decisions make clear that Congress may not exert control, whether formally or "in effect," over the exercise of executive authority. Congress therefore may not make its agents members of a body if that entity possesses functions and powers that Congress may not exercise itself. By giving congressional agents the influence that comes from participation in all the deliberations of an Executive Branch agency, Congress has improperly enlarged its own power beyond the legislative sphere. The presence of congressional agents as members of an Executive Branch agency also threatens to impair the Commission's independent conduct of its responsibilities.

2. Even though the ex officio membership of the Secretary and Clerk violates separation-of-powers

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would continue to be given the same precedential effect as before the court of appeals' decision, *id.* at 59,642.

principles, the Court should—as it did in *Buckley* v. *Valeo*—accord de facto validity to the Commission's previous acts, including the civil penalty imposed in this case. That disposition would be consistent with the Court's longstanding application of the "de facto officer doctrine," which gives validity to acts of officers regardless of any defects in the legality of their appointment or election. Prospective application of the Court's decision would be especially appropriate in the present case, since any connection between the Commission's unlawful composition and the judgment ultimately entered against respondents is far too attenuated to outweigh the public interest in effective implementation of the federal campaign laws.

ARGUMENT

I. THE MEMBERSHIP ON THE COMMISSION OF THE SECRETARY OF THE SENATE AND THE CLERK OF THE HOUSE OF REPRESENTATIVES VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS

A. 1. The Federal Election Commission was established by Congress to "administer, seek to obtain compliance with, and formulate policy" with respect to the Federal Election Campaign Act of 1971, as amended, and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). See pages 2-5, *supra*. The Commission's enforcement power is "both direct and wide ranging" and substantially independent of the Attorney General and the Department of Justice. See *Buckley* v. *Valeo*, 424 U.S. 1, 111-113 (1976) (per curiam). The decision whether to undertake enforcement actions rests solely with the

Commission[5] (which also possesses independent litigating authority with respect to various provisions of the Act and Chapters 95 and 96 of Title 26). See 2 U.S.C. 437d(a)(6); 26 U.S.C. 9010(d), 9040(d). In *Buckley*, this Court held that the Commission's enforcement powers and administrative functions are of a type that may be exercised only by Executive Branch "Officers of the United States" appointed pursuant to Article II, § 2, Cl. 2, of the Constitution. 424 U.S. at 137-141.

2. All decisions of the Commission must be made by a majority of the voting members, with an affirmative vote of four members required to initiate or appeal civil actions, to render advisory opinions, to develop or alter rules or forms, and for certain other acts. See 2 U.S.C. 437c(c). The Secretary and Clerk do not have the right to vote on Commission actions. In all other respects, however, the statute describes these officials as "members" of the Commission. See 2 U.S.C. 437c(a)(3)-(5) (providing that "members (other than the Secretary of the Senate and the Clerk of the House of Representatives)" are subject to specified limitations and privileges). This Court in *Buckley* also so characterized them, stating that the Commission "consists of eight members. The Secretary * * * and the Clerk * * * are *ex officio* members of the Commission without the right to vote." 424 U.S. at 113 (footnote omitted); see also *id.* at 267-268 (White, J.). As

[5] Responsibility for criminal enforcement of federal election laws remains with the Department of Justice. The Commission may refer to the Attorney General knowing and willful violations of the Act, or of Chapter 95 or 96 of Title 26, if it finds probable cause to believe that such a violation has occurred or is about to occur. 2 U.S.C. 437g(a)(5)(C). The Attorney General is then obliged to report any actions taken with respect to the apparent violation. 2 U.S.C. 437g(c).

members, the Secretary and Clerk are entitled to all the prerogatives of membership not specifically proscribed. Thus, they may attend and participate fully in the Commission's meetings and discussions (see 2 U.S.C. 437c(d)) concerning the exercise of any of its functions (including the bringing of an enforcement action), assist in the formulation of the Commission's internal rules and procedures (see 2 U.S.C. 437c(e)),[6] and participate in

[6] The rules employed by the Commission at the time of the court of appeals' decision (prior to the reconstitution of the FEC as a body of six voting members, see note 4, *supra*), purported to exclude the Secretary and Clerk from the definition of "member." Directive No. 10, Federal Election Campaign Financing Guide (CCH) ¶ 2043, at 2512 (1989) (subpart A(1)). Under these rules, the Secretary and Clerk could not call meetings in addition to those required by statute (*id.* subpart A), contrast 2 U.S.C. 437c(d) ("The Commission shall meet at least once each month and also at the call of any member."); did not contribute to the presence or absence of a quorum (Directive No. 10, *supra*, ¶ 2043, at 2512 (subpart B)); and could not request that motions be reduced to writing or vote on certain motions (*id.* at 2512-2513 (subpart E)). It is unclear under the rules whether opposition by an ex officio member to adoption of a matter would compel that a vote be taken prior to its adoption (*id.* at 2513 (subpart G)).

As "Commissioner[s]," however, the ex officio members appear to have possessed the right to speak as a matter of personal privilege under the rules. Directive No. 10, *supra*, ¶ 2043, at 2513 (subpart F); compare 11 C.F.R. 5.1(b) ("Commissioner" includes Secretary and Clerk for purposes of considering public access to documents) with 11 C.F.R. 7.2(b) ("Commissioner" limited to voting members for purposes of provisions regarding standard of conduct). The FEC also subscribes to Robert's Rules of Order Newly Revised (1970), see Directive No. 10, *supra*, ¶ 2043, at 2514 (subpart K). Under Robert's Rules of Order, no member can be precluded from attending meetings except where he or she has run afoul of bylaws or is properly subject to discipline. See *id.* § 60, at 539; cf. *id.* § 46, at 386 (honorary members have the right to

personnel decisions and in the Commission's coordination with other Executive Branch entities (see 2 U.S.C. 437c(f)). They may also participate in writing the Commission's advisory opinions, which exempt specified persons from liability for conduct undertaken in good faith reliance on the opinion, even if that conduct is later determined to constitute a violation of the FECA. See 2 U.S.C. 437f.

The legislative history of the FECA further evidences Congress's expectation that the Secretary and Clerk would play a broad role in the Commission's exercise of its functions, despite the absence of voting power. Under the prior statutory scheme (the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)), the Secretary and Clerk were given a broad range of duties, including the responsibility for reporting apparent violations of law, the authority to direct the Attorney General to institute civil actions, and rule-making and regulatory functions. Pub. L. No. 92-225, §§ 301(g), 308, 86 Stat. 12, 16-18. The creation by the 1974 Amendments of an eight-member Commission (on which the Secretary and Clerk were included as non-voting members) was prompted in part by concerns that these officials had executed their responsibilities in an inefficient and partisan fashion.[7] See Pub. L. No. 93-443, § 208(a), 88 Stat. 1280; see also H.R. Rep. No. 1438, 93d Cong., 2d Sess. 88-90 (1974).

Immediately following this Court's decision in *Buckley*, Congress considered legislation that would re-

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attend meetings and to speak, but not to make motions or vote unless that authority is specifically provided).

[7] See, *e.g.*, H.R. Rep. No. 1239, 93d Cong., 2d Sess. 131-133 (1974) (supp. views of Rep. Frenzel); 120 Cong. Rec. 27,507 (1974) (Rep. Broyhill).

establish the Commission in a manner consistent with the Appointments Clause. When the Senate debates began, Senator Griffin introduced an amendment that would have eliminated the Secretary and Clerk as Commission members. 122 Cong. Rec. 6691 (1976). To explore the intended scope of the participation of the ex officio members, Senator Mansfield incorporated into the record a letter from the incumbent Secretary of the Senate, who explained that his present role (and the role of his full-time designee) was to represent the interests of the Senate in a variety of ways. *Id.* at 6705. The Secretary also reported the views of the present commissioners that "ex officio members should have all rights and privileges and responsibilities of the other Commissioners, except the right to vote." *Ibid.*

After further exchange (122 Cong. Rec. 6705-6706 (1976)), Senator Mansfield secured Senator Cannon's agreement that the Secretary was to serve "in connection with Senate campaign matters which come within the purview of the Commission and that the law permits the Secretary to advise with, discuss, question and, except for the right to vote, participate fully in the proceedings of the Commission in this respect." *Id.* at 6940. Senator Griffin's view was solicited, and he stressed the committee's intent that "to the extent of constitutionality" the Secretary and Clerk would be participating (but non-voting) members of the FEC. Senator Mansfield agreed, and Senator Allen added that the Secretary "would have the full right to advise with the Commission and to participate in any discussion or in any matter coming before the Commission; to give his advice, arising from his expertise in this area, but not to have the right to cast a vote." *Ibid.*

Following conference on the Senate bill, Representative Brademas indicated agreement with the Senate's

assessment of the ex officio members. Representative Brademas noted that the bill would change the method by which the six voting members were selected (in response to *Buckley*), but stated that

> [i]n other respects, * * * the makeup of the Commission will remain essentially unchanged. The Clerk of the House and the Secretary of the Senate will continue to serve on the Commission, ex officio. The Clerk and Secretary will not have the right to vote, but otherwise will be accorded all of the other rights, including participation in Commission meetings, which belong individually to the six Presidentially appointed Commissioners.

122 Cong. Rec. 12,203 (1976).[8]

B. This Court held in *Buckley* that many of the functions performed by the FEC—including the civil enforcement authority at issue in this case—involve the exercise of executive power. See 424 U.S. at 138. In *Bowsher* v. *Synar*, 478 U.S. 714, 722-727 (1986), the Court reaffirmed that officials responsible to Congress may not be vested with authority to execute the laws. See also

[8] While supporting legislation to reestablish the Commission, the Ford administration recommended that the membership of the Secretary and Clerk be eliminated. Testifying before a Senate subcommittee on behalf of the Department of Justice, one administration official explained that "the spirit of the [*Buckley*] opinion, and even the letter of the Constitution, require this result." *Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Admin.*, 94th Cong., 2d Sess. 119 (1976) (*1976 Hearings*) (testimony of Assistant Attorney General Scalia). At a minimum, he stated, the inclusion of congressional officials in the Commission's membership would pose an unacceptable risk of further litigation. *Id.* at 120; see also *id.* at 134-137.

Metropolitan Washington Airports Auth. v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (*MWAA*) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it."). It is therefore entirely clear that the Secretary and Clerk could not, consistent with this Court's separation-of-powers decisions, be made voting members of the Commission.[9] The question in this case is whether the absence of voting power renders constitutional the participation of congressional agents on an agency exercising substantial executive powers. We believe that question must be answered in the negative.

1. Although "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct," *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989), this Court has reviewed with particular vigilance statutory provisions that threaten "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122. "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta*, 488 U.S. at 382 (quoting

[9] The Secretary and Clerk are among the "officers of the Congress" elected by the Members, see 2 U.S.C. 60-1(b); *Buckley*, 424 U.S. at 128 & nn.163-164, and they indisputably function as congressional agents. Indeed, the potential for Legislative Branch control is greater here than in prior cases: neither the individual Members of Congress who served on the Board of Review in *MWAA*, nor the Comptroller General in *Bowsher*, was as responsive to Congress as are the Secretary and Clerk.

INS v. *Chadha*, 462 U.S. 919, 951 (1983)).[10] The records of the Constitutional Convention and the *Federalist Papers*, moreover, particularly emphasize the danger that *Congress* "will aggrandize itself at the expense of the other two branches." *Buckley*, 424 U.S. at 129 & n.166. As James Madison recognized,

> it is against the enterprising ambition of [the legislative] department, that the people ought to indulge all their jealousy and exhaust all their precautions.
>
> * * * Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.

The Federalist No. 48, at 332-334 (J. Cooke ed. 1961). See *MWAA*, 501 U.S. at 273-274. Accord *Bowsher*, 478 U.S. at 727 ("The dangers of congressional usurpation of Executive Branch functions have long been recognized.").

2. *Bowsher* and *MWAA* enunciate two principles that are central to judicial application of the anti-aggrandizement principle. First, Congress may not assert control, whether formally or "in effect," over the exercise of executive authority. See, *e.g.*, *MWAA*, 501 U.S. at 274 (anti-aggrandizement principle aimed at "forestall[ing] the danger of encroachment beyond the legislative sphere") (internal quotation marks omitted); *Bowsher*, 478 U.S. at 734 ("Congress in effect * * * retain[s]

[10] The Court noted in *Mistretta* that it had "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. 488 U.S. at 382.

control over the execution of the Act and * * * intrude[s] into the executive function. The Constitution does not permit such intrusion.").[11] Second, judicial enforcement of the anti-aggrandizement principle involves the application of bright-line rules, designed to determine whether a particular statutory scheme creates the *potential* for congressional usurpation of Executive Branch functions, rather than a fact-specific inquiry into the actual manner in which that scheme has been implemented. See *Bowsher*, 478 U.S. at 730; see also *MWAA*, 501 U.S. at 269 n.15 ("the likelihood that Congress will discipline Board members by depriving them of committee membership" was "irrelevant for separation-of-powers purposes"); *id.* at 277 (irrelevant that statutory scheme "might prove to be innocuous").

[11] See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935) ("[E]ach of the three general departments of government [must remain] *entirely free from the control or coercive influence, direct or indirect,* of either of the others") (emphasis added); *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933) ("[E]ach department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that *the acts of each shall never be controlled by, or subjected, directly or indirectly,* to, the coercive influence of either of the other departments.") (emphasis added). Cf. *Chadha*, 462 U.S. at 951 (the Constitution created three defined Branches "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility"); *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may *control, direct or restrain* the action of the other.") (emphasis added); 1 *The Works of James Wilson* 367 (James DeWitt Andrews ed., 1896) (each department's proceedings "should be free from the remotest influence, direct or indirect, of either of the two other powers") (*quoted in O'Donoghue*, 289 U.S. at 530).

3. In our view, one such bright-line rule is that Congress may not place its agents as members of a governmental body, even in a non-voting capacity, if that body exercises powers that Congress may not exercise itself. Inclusion of the Secretary and Clerk as members of the Commission is therefore unconstitutional.[12]

a. By making them Commission members, the Act secures for these agents of Congress a comprehensive and impermissible means of influence over the Commission's decisionmaking. The FECA compels the Commission to afford the Secretary and Clerk an integral role in all its deliberative processes. By participating as members in the FEC's deliberations, the ex officio agents give Congress the ability to express its views from within the Commission on issues involving the execution and administration of the FECA in specific

[12] Respondents, in their brief in opposition, have indicated that they may raise in defense of the judgment two other claims rejected by the court of appeals below: that the absence of any statutorily specified removal authority unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3; and that the statute unconstitutionally restricts the President's nomination power under the Appointments Clause by imposing restrictions on the party affiliation of appointments to the Commission. See 2 U.S.C. 437c(a)(1).

We believe that those issues were resolved correctly by the court of appeals. While the FECA is silent as to the President's power to remove commissioners, the court correctly reasoned that the Act may be construed to afford the President constitutionally sufficient removal power. Pet. App. 11a-12a. As to the alleged restriction on the President's appointment power, we also agree with the court of appeals that respondents lack standing to raise that claim, since it is impossible to determine in this case whether the bipartisanship requirement actually served to limit the President's choices. *Id.* at 8a-11a.

cases and instances.[13] Placement of the Secretary and Clerk on the Commission's membership also has the likely effect (as well as the apparent purpose) of causing the other commissioners to regard them as *colleagues* (rather than as members of a separate Branch of government) and to interact with them on that basis.[14] Although Congress has ample power to investigate or inform through legislative hearings or similar procedures, its attempt to *participate* (through its agents) in all the activities of the Commission constitutes a circumvention of the ordinary legislative role.

There is, of course, nothing illegitimate about efforts by members of one Branch to influence the decisions of the others. The continuous dialogue between the political Branches gives rise to numerous occasions for committees, Members, and agents of Congress to express their views to Executive Branch agencies concerning the administration and enforcement of

[13] As we explain above, see pages 11-14, *supra*, the ex officio members are entitled by statute to all of the prerogatives of membership not specifically proscribed. Moreover, even if the statute were construed to permit the voting members to exclude the Secretary and Clerk from their deliberations, the Act would place the burden of resisting all encroachment on the voting members of the Commission. Under the statute, the onus is plainly on those who would resist congressional access, rather than on those seeking access, a form of burden-shifting that reflects legislative encroachment.

[14] See also *1976 Hearings* 119 ("The power to be present and to participate in discussions is the power to influence. Normally, a judge, commissioner or juror, or even a corporate director, who is disqualified for conflict of interest, is expected to recuse himself not only from voting but from deliberations as well.") (testimony of Assistant Attorney General Scalia). That sort of structural defect is sufficient to violate the constitutional separation of powers.

federal law. Congress must engage in such advocacy, however, in a manner consistent with the structural limitations imposed by separation-of-powers principles. Frank interchange of views *between* the Branches is entirely consistent with these principles; but Congress may not attempt to assert its views from *within* the Executive Branch by creating for its agents positions as members of an agency exercising executive powers.[15]

b. Quite apart from the ability of the Secretary and Clerk to participate in and influence the Commission's decisionmaking processes, the presence of these officials as Commission members threatens to impede the voting commissioners in the independent exercise of their statutory responsibilities. The prospect that these congressional employees will report on FEC proceedings to Congress may cause the other members to "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States* v. *Nixon*, 418 U.S. 683, 705-706 (1974); see also The Federalist No. 70, at 472 (Alexander Hamilton) (J. Cooke ed. 1961). For its law enforcement functions, in particular, a lack of confidentiality may cause the FEC to "shade [its] decisions instead of

[15] Certain constitutional provisions confer on one of the Branches a formal constitutional role in submitting its advice and recommendations to another Branch. See Art. II, § 2, Cl. 2 (the President shall have the power, "by and with the Advice and Consent of the Senate," to appoint officers and make treaties); Art. II, § 3 (the President "shall from time to time * * * recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"). Neither of the constitutional provisions cited above, however, contemplates a procedure by which agents of one Branch will attempt to assert influence from *within* the other Branch. But see Art. I, § 3, Cl. 4 ("The Vice President of the United States shall be President of the Senate.").

exercising the independence of judgment required by [its] public trust." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976).[16] This lack of confidentiality may also impair the FEC's ability to gather information and otherwise perform its statutory mission if candidates for elective office are deterred from cooperating because of the presence and participation of congressional employees. Cf. *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 488 (Kennedy, J., concurring in the judgment).

4. Congressional participation in the Commission's decisionmaking processes also contravenes related constitutional principles. Although the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, is not applicable here, its adoption reflects the Framers' determination to separate Congress's authority to prescribe generally applicable laws from the power to enforce and apply those laws in specific cases, which inheres in the Executive and the Judiciary. See *United States* v. *Brown*, 381 U.S. 437, 441-446 (1965). While Congress may proscribe particular types of conduct, it may not seek to determine whether its proscription has been violated in a particular

[16] In this respect, the analogy drawn by the court of appeals to the non-voting participation of alternate jurors is an apt one. Pet. App. 14a (citing Fed. R. Crim. P. 24(c)). Just as the presence of alternate jurors during jury deliberations may not be presumed to affect substantial rights of a litigant absent a specific showing of prejudice, see *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993), it cannot be assumed that the potential influence of the ex officio members influenced this particular case. Nevertheless, it is readily apparent that alternate members might participate in jury deliberations, see *id.* at 1780-1781, and that their presence might exert an effect on the decisions of the regular jurors, *ibid.* (citing *United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982), and *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973)).

case.[17] By making its agents members of an entity with executive powers, however, Congress by statutory command has inserted itself into deliberations regarding enforcement decisions in specific cases, retaining influence over the Branch charged with the execution of its laws.[18]

5. The statutory assignment of Members of Congress, or congressional agents, to positions within the other Branches poses risks not apparent in the assignment of executive or judicial officials to positions in a different Branch. Compare, *e.g.*, 20 U.S.C. 42 and 43 (ex officio membership of Chief Justice of the United States, among others, on Smithsonian Institution Board of Regents); 28 U.S.C. 991(a) (ex officio membership of Attorney General or her designee on the Sentencing Commission). Neither the Executive nor the Judicial Branch can compel the creation of positions benefitting its members.

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[17] See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974) ("Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.").

[18] Respondents have not contended that the ex officio membership of the Secretary and Clerk violates the Appointments Clause, and we accordingly express no view on the question. We note, however, that the inclusion of the Secretary and Clerk within an Executive Branch agency, and their potential to affect the outcome of the Commission's deliberations, might also support the contention that these officials (insofar as they act as members of the FEC) function as "Officers of the United States." If that contention were accepted, the placement of the Secretary and Clerk upon the Commission would also violate the Appointments Clause under the reasoning of *Buckley* v. *Valeo*.

The dangers of aggrandizement are therefore not so great when Congress assigns cross-Branch functions to members of other Branches as when Congress establishes positions in other Branches for its own Members or agents. See *Mistretta*, 488 U.S. at 382.[19]

II. THE PRIOR ACTS OF THE COMMISSION SHOULD BE ACCORDED DE FACTO VALIDITY, AND THE CIVIL PENALTY IMPOSED IN THIS CASE SHOULD ACCORDINGLY BE SUSTAINED

Although the membership of congressional agents on an executive body violates constitutional separation-of-powers principles, the civil penalty imposed in this case should nevertheless be sustained. In *Buckley*, this Court held that the Commission as then composed could not constitutionally exercise the substantial executive powers vested in it by the governing statute. The Court concluded, however, that

> the Commission's inability to exercise certain powers because of the method by which its members

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[19] In *Mistretta*, this Court principally considered whether the duties of the Sentencing Commission could be assigned to Article III judges removable from the Commission by the President. In addition, the Court addressed the question whether Congress could "requir[e] that those judges share their rulemaking authority with nonjudges." 488 U.S. at 384. The Court held that such a requirement was consistent with the Constitution. Had Congress appointed its own Members or agents to the Sentencing Commission, however, the case would have raised "the particular danger of the Legislative Branch's accreting to itself judicial or executive power." *Id.* at 382. That particular danger *does* arise from the membership of congressional agents on the Federal Election Commission.

> have been selected should not affect the validity of the Commission's administrative actions and determinations to this date * * *. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

424 U.S. at 142 (citing cases). This Court should follow the same course of action here.

A. In holding that the Commission's prior acts should be "accorded *de facto* validity," 424 U.S. at 142, despite the constitutional flaw in the appointment of its members, the decision in *Buckley* was in keeping with this Court's longstanding application of the "de facto officer" doctrine. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-449 (1886); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Waite* v. *Santa Cruz*, 184 U.S. 302, 323 (1902). Under that doctrine, a "person actually performing the duties of an officer under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945).

The de facto officer doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441. Accord *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently

occupying government offices could later be invalidated by exposing defects in the officials' titles."). These concerns are directly applicable to the present case.

B. In one significant respect this Court's de facto officer doctrine cases are distinguishable from more recent decisions such as *Buckley*. Where the de facto officer doctrine has been applied, the Court has typically declined to address the legal validity of the officer's appointment or election, on the theory that the purported unlawfulness of the officer's selection furnished no basis for a "collateral attack" on his acts in office. *Ball*, 140 U.S. at 129; see also *McDowell*, 159 U.S. at 601-602; *Lindsley*, 148 F.2d at 23; *Ryan* v. *Tinsley*, 316 F.2d 430, 432 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963). In more recent decisions, by contrast, the Court has addressed and decided issues concerning the legality of the challenged officers' appointment or exercise of power, but has determined that its decision should be given prospective effect only. See, *e.g.*, *Buckley* v. *Valeo*, *supra*; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in the judgment); see also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422 (1964).

In determining that those decisions should be given prospective application, the Court has invoked considerations closely related to those that underlie the de facto officer doctrine. In *Northern Pipeline*, for example, the plurality explained that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 458 U.S. at 88; see also *id.* at 92 (Rehnquist, J., concurring in the judgment).

Respondents in the present case do not quarrel with the manner in which the Commission processed their case; rather, as in *Buckley* and *Northern Pipeline*, they assert a *systemic* challenge to the composition of the governmental body. As in those cases, retroactive application of a decision in their favor would call into question a substantial number of actions taken by the Commission over a prolonged period of time. The public interest in effective enforcement of federal campaign laws weighs strongly against this result.

Moreover, prospective application of the Court's decision would not be inequitable to respondents. Respondents do not contend, and the court of appeals did not suggest, that the presence of the Secretary and Clerk somehow tilted the Commission's proceedings in this case in a manner adverse to their interests. "Indeed, [respondents] have not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question." Pet. App. 26a. Nor is there any reason to believe that the membership of the Secretary and Clerk would, as a general matter, disserve the interests of private parties such as respondents.

It bears noting, in addition, that the present case involves a challenge to the Commission's prosecutorial rather than adjudicative functions. Respondents do not contest the impartiality or constitutional qualifications of the district judge who, in adjudicating the Commission's complaint, found the existence of a statutory violation and determined an appropriate civil penalty. They argue instead that the proceeding was tainted because the agency that brought the action was improperly constituted. Any connection between the Commission's unlawful composition and the judgment ultimately entered against respondents by the district

court is far too attenuated to outweigh the public interest in effective implementation of the federal election laws.[20]

C. The legitimacy of prospective judicial decision-making has, we recognize, recently been called into question. In *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), Justices Souter and Stevens expressly reserved the question whether such "pure" prospectivity was permissible, *id.* at 544, although they acknowledged that in a few prior cases the Court had followed this course, *id.* at 536 (citing, *inter alia*, *Buckley* v. *Valeo*). The Chief Justice and Justices White, O'Connor, and Kennedy would have held in *James Beam* that the Court could decline, in an appropriate case, to apply newly announced rules of law to the parties before it, see *id.* at 544-547 (White, J., concurring in the judgment), 549-559 (O'Connor, J., dissenting); Justices Blackmun, Marshall, and Scalia would have held that it could not, *id.* at 547-548 (Blackmun, J., concurring in the judgment), 548-549 (Scalia, J., concurring in the judgment).[21]

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[20] Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("The rigid [conflict-of-interest standards], designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity."); *id.* at 248-250.

[21] Somewhat different issues are raised by the practice of "selective prospectivity," by which a court "appl[ies] a new rule in the case in which it is pronounced, then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *James Beam*, 501 U.S. at 537 (opinion of Souter, J.). Selective prospectivity "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Ibid.* The Court has definitively rejected this practice, holding that "[w]hen [the Supreme] Court applies a rule of federal law to the

Unless and until the Court's prior decisions employing pure prospectivity are overruled, established law makes clear that this course of action is permissible in appropriate situations.[22] In our view, prospective application of a judicial decision can be an essential means of preventing unjustified disruption of settled expectations, while ensuring that important legal questions do not remain unresolved. Such an approach is particularly suitable in cases like the present one. Respondents raise a systemic challenge to the composition of a governmental body, such that retroactive application of a decision in their favor would substantially disrupt the implementation of federal election law; yet the asserted flaw in the FEC's composition is not one that could realistically be supposed to have disserved their interests. Under these circumstances the Court should, as it did in *Buckley*, accord de facto validity to the Commission's prior actions.[23]

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parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993).

[22] In the instant case, the court of appeals (without citing *James Beam* or acknowledging the existence of prior decisions employing pure prospectivity) simply stated that "we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case." Pet. App. 18a. In light of this Court's precedents, that reasoning is plainly inadequate.

[23] This Court has reserved the use of pure prospectivity for decisions that "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106 (citation omitted). The court of appeals acknowledged that this Court "has not considered the circumstances of this case," since prior separation-of-powers disputes involved the grant of "explicit voting or decisionmaking power that is not present here." Pet. App. 15a. Although we believe that this distinction does not save the statute from constitutional attack, see pages 15-21, *supra*, the invalidation of the challenged provision cannot be said to have been "clearly foreshadowed" by this Court's prior decisions.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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